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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

No. 688

JOHN T. DAVIS,

Petitioner,

vs.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, CHICAGO AND EASTERN ILLINOIS RAILROAD COMPANY,

Respondents.

PETITION FOR WRIT OF CERTIORARI.

PETITIONER'S REPLY BRIEF.

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THE DUNLOP-GLOVER PRINTING COMPANY, CHICAGO

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In their Brief in Opposition to Petition for Writ of Certiorari, respondents give magnified significance to the dismissal of petitioner's petition for rehearing filed before the Appellate Court of Indiana when the cause was before that Court. That such significance is not justified is apparent when it is pointed out that the Appellate Court summarily sustained the motion of the respondent, Louisville and Nashville Railroad Company, to dismiss said petition on the third day after such motion was filed (R. 2) and without allowing a reasonable period of time for the petitioner herein to state his opposition to such motion

and its supporting brief, and thereby to be heard thereon, and without notice given by such respondent to the petitioner herein that such motion and supporting brief would be filed in said Court and of the date therefor. (R. 1-2.) No announced rules of the Supreme Court of Indiana, the body in which the rule-making authority was vested, which fixed the time for filing an answer to such motion existed.

On the third day after such motion was filed before said Court and without notice of any ruling on said motion by said Court, petitioner herein mailed his brief in opposition to said motion to the Clerk of said Court to be filed in said cause before said Court. Said brief was received by said Clerk on the fourth day after the filing of said motion and was filed in said cause (R. 2), but said motion had already been sustained by the Appellate Court of Indiana on May 11, 1961. (R. 2.)

Thereafter, petitioner filed his petition to transfer said cause to the Supreme Court of Indiana within the time prescribed therefor, supporting the same with a brief. (R. 2.) In his said petition to transfer, and at the first opportunity for doing so, petitioner herein, among other required allegations, alleged that because of the ruling of the Appellate Court on said motion to dismiss his petition for rehearing, dismissing said petition without affording petitioner herein a reasonable opportunity to be heard thereon, petitioner herein had been denied due process of law under Section 1 of the Fourteenth Amendment to the Constitution of the United States. (R. 142-156.)

Thereafter, respondents filed their petitions to dismiss said petition to transfer on the ground that said Appellate Court of Indiana had dismissed said petition for rehearing for failure to comply with Rule 2-22 of the Rules of the Supreme Court of Indiana. (R. 2, 3.) Said petitions to dismiss said petition to transfer were filed on June 2, 1961, and June 5, 1961. (R. 2, 3.) The Supreme Court

of Indiana denied the petition to transfer. (R. 3.) This occurred on November 2, 1961. (R. 3.) In so doing, it specifically overruled petitioner's contention that he had been denied due process of law under the Constitution of the United States. *Evansville City Coach Lines, Inc. v. Atherton* 1962, Ind. App. , 179 N. E. 2d 293. However, the Supreme Court of Indiana did not specifically act on the said petitions to dismiss said petition to transfer. (R. 1-3.)

A rule of procedure in a State court may not be so applied as to violate rights guaranteed and protected by the Constitution of the United States when such rights have been claimed and raised for, and are accorded, the court's consideration. *Murray v. Charleston* 1878, 96 U. S. 432, 24 L. Ed. 760.

Human rights, rather than the rules which affect and govern them, are the sanctified and hallowed. Human values should never be foreclosed and sacrificed by a remedial channel which threatens their survival by raising superficial technicalities confusedly interpreted and denying a hearing in defense of such values cast in the shadow of such unwarranted odds. *Konigsberg v. State Bar of California* 1957, 353 U. S. 252, 1 L. Ed. 2d 810, 77 S. Ct. 722.

Rule 2-22 itself (Appendix C, Petition for Writ of Certiorari), when read and compared with the holdings of the Supreme and Appellate Courts of Indiana, presents a dilemma to the pleader because of the state of confusion which persists in the decisions interpreting the Rule and the wide disparity between the common, ordinary meaning which a reading of the Rule conveys and the various and conflicting meanings which seem to be given to it by the decisions of the State courts. The Rule says nothing about "stating concisely the reasons why *the assigned errors set out in the petition for rehearing* are thought to be er-

roneous," as contended in said motion of the respondent, Louisville and Nashville Railroad Company, to dismiss said petition for rehearing in the Appellate Court of Indiana, but provides instead for "stating concisely the reasons *why the decision* is thought to be erroneous." (Our emphasis.) Thus, the way is cleared for a showing of an inference that the Court, in sustaining the motion to dismiss the petition for rehearing, is chargeable with interpreting the Rule with the specific intent to deprive the petitioner herein of his rights under the Federal Employers' Liability Act. The inference reasonably flows from the fact that a loose interpretation of the grounds of the motion to dismiss, on one side, was coupled with an unmerited strict, unreasonable, and arbitrary construction of the Rule against the petitioner herein. Therefore, the Appellate Court's decision to dismiss does not rest upon an independent ground of State law capable of maintaining the judgment. *Ward v. Board of County Commissioners* 1920, 253 U. S. 17, 64 L. Ed. 751, 40 S. Ct. 419; *Lawrence v. State Tax Commission* 1932, 286 U. S. 276, 76 L. Ed. 1102, 52 S. Ct. 556.

Moreover, a reading of the cases cited by respondents on page 6 of their Brief in Opposition to Petition for Writ of Certiorari not only reveals the confusion in the interpretation of this Rule by the Indiana courts but also do not specifically show that the interpretation for which the respondents here contend was adopted previously in the specific type of case and under the same circumstances which prevail here. *Konigsberg v. State Bar of California, supra*, 1957, 353 U. S. 252, 1 L. Ed. 2d 810, 77 S. Ct. 722.

Respondents' contention that the petition for writ of certiorari fails to comply with Rule 23-1(f) of the Rules of this Court in that it does not contain petitioner's complaint or respondents' demurrers thereto evidently stems from a misconceived substitution of appeal procedure for

certiorari procedure. Petitioner believes that a reading of his petition for writ of certiorari will show that the questions have been raised and references to the record made therein in the manner required by Rule 23-1(f) of the Rules of this Court.

Respondents' grounds that the petition for writ of certiorari was not timely filed has been answered adversely to respondents' position in the case of *American Railway Express Company v. Levee*, 1923, 263 U. S. 19, 68 L. Ed. 140, 44 S. Ct. 11.

Finally, it is beside the point if the Appellate Court of Indiana merely recognized that the cause is determined under the Federal Employers' Liability. The important consideration is that in reaching and establishing material conclusions in its decision that Court did in fact forsake and refused to apply the controlling principles of law laid down in the holdings of this Court in such cases, and by so doing established precedents which result in departures from uniformity in the application and administration of the Federal Employers' Liability Act. A reading of that decision brings that realization, because, in the crucial and telling conclusions reached, there is a clear and astounding lack of Federal authority cited by the Appellate Court in support thereof.

For the foregoing additional reasons, along with those contained in petitioner's petition for writ of certiorari, it is respectfully submitted that the petition for writ of certiorari should be granted.

Respectfully submitted,

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